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Supreme Court, U.S.
FILED
07-551 OCT 19 2007
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No. 07-

IN THE

Supreme Court of the United States

JOSHUA MICHAELY,

Petitioner,

v.

PATTI MICHAELY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT, DIVISION FIVE

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents a very important question to be resolved concerning the imposition of discovery sanctions: does the trial court have an affirmative duty to impose sanctions tailored to remedy the specific discovery abuse and to ensure such sanctions are not imposed as a punishment, or does the trial court have plenary power to impose any sanctions it sees fit, no matter how broad and how punishing, and no matter if it strips a litigant of their right to be heard at trial? If plenary power to punish is permissible, then what if any limitations does the due process clause impose on such punishment for discovery abuse?

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Petitioner Joshua Michaely respectfully petitions this Court for a Writ of Certiorari to review the judgment and Opinion of the California Court of Appeal.

OPINIONS BELOW

The opinion of the Court of Appeal is reported at 150 Cal.App.4th 802. The California Supreme Court denied review on July 25, 2007.

JURISDICTION

This Petition has been filed within ninety days of the opinion below; this Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution, section 1 specifies:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

The published decision in this case effectively gives license to all judges to impose any discovery sanctions they want for any behavior without need or regard to how such sanctions are designed to redress the discovery abuse and without regard to any due process considerations. The decision in this case gives judges the authority to strip a litigant of the right to present evidence or witnesses at trial without restriction, as happened here. As such, this decision is a direct affront and violation of the due process clause of the United States Constitution.

This case presents a very important question to be resolved concerning the imposition of discovery sanctions: does the trial court have an affirmative duty to impose sanctions tailored to remedy the specific discovery abuse and to ensure such sanctions are not imposed as a punishment, or does the trial court have plenary power to impose any sanctions it sees fit, no matter how broad and how punishing, and no matter if it strips a litigant of their right to be heard at trial? If plenary power to punish is permissible, then what, if any, limitations does the due process clause impose on such punishment for discovery abuse?

A. Trial Court Proceedings

Respondent filed for divorce from Petitioner on January 5, 1995. (CT: Vol. 1: 1-6)[1] On that same day, she

1. "CT" refers to the Clerk's Transcript on file in this case, while "Vol." refers to the specific volume of the Clerk's Transcript. In this case, then, this reference refers to Clerk's Transcript, volume 1, pages 1 through 6.

filed an *ex parte* Application without notice to Petitioner asking for numerous orders. (CT: Vol. 1: 11-71) Of the 19 pages of orders granted that morning, the following related directly to Respondent's rights to discover into the business affairs of Petitioner as well as into the holdings of the community estate:

A. Respondent, her attorneys, security guards, locksmiths, photocopy personnel accountants, and other agents were granted immediate access to Petitioner's office, car and residence for the purpose of copying Petitioner's business records; (CT: Vol. 1: 14)

B. Petitioner, Maureen Sowell (Petitioner's long time business partner and assistant) and all of Petitioner's other agents and employees were enjoined and restrained from interfering with Respondent's access to Petitioner's business records; (CT: Vol. 1: 15)

C. Petitioner, Maureen Sowell and all of Petitioner's other agents and employees were to provide Respondent and her agents with all business books and records including check books, cancelled checks, check stubs, check registers, schedules, ledgers, journals, statements, correspondence, computer passwords and car keys to Petitioner's automobile; (CT: Vol. 1: 15-16)

D. Petitioner, Maureen Sowell and all of Petitioner's other agents and employees were to provide immediate access and to unlock all safes, file folders, file cabinets, desks, cupboards, and computers in Petitioner's office; (CT: Vol. 1: 16)

E. Respondent was permitted to photocopy all financial documents found by her during her inspection of Petitioner's office, residence and car; (CT: Vol. 1: 17-18)

F. Petitioner, Maureen Sowell and all of Petitioner's other agents were enjoined and restrained from altering, destroying, withholding, concealing or removing any writings or other objects from Petitioner's office, residence or car; (CT: Vol. 1: 17)

G. Respondent was permitted to station a security guard at Petitioner's office door during the course of their inspection (which lasted more than six days) and to prohibit the entry of Petitioner or his agents from the premises during non-business hours; (CT: Vol. 1: 23)

H. *Code of Civil Procedure* §§2025(b)(2), 2030(b), *2031(b)* and 2033(b) were suspended and Respondent could immediately commence discovery; (CT Vol. 1: 31)

I. The provisions of California *Code of Civil Procedure* §2025(q)(1) were shortened so that Petitioner had to sign any deposition transcript within 10 days of receipt; (CT: Vol. 1: 31)

J. *Code of Civil Procedure* §1985.3's time for notice of the subpoena of personal records was shortened to 10 days notice to Petitioner prior to the hearing and five days notice prior to the date of any deposition of a custodian of records; (CT: Vol. 1: 31)

K. *Code of Civil Procedure* §1987(c)'s time requirement for notice to appear and produce documents at a court hearing was shortened to 15 days prior to the hearing; (CT: Vol. 1: 31-32)

L. *Code of Civil Procedure* §2025's notice of deposition requirement was shortened to 10 days; (CT: Vol. 1: 32)

M. *Code of Civil Procedure* §2031's time for Petitioner to respond in writing to requests for production of documents was shortened to 10 days prior to the taking of Petitioner's deposition. (CT: Vol. 1: 32)

As a result of these orders, Respondent and her agents, including armed off-duty police officers, went to Petitioner's office and spent more than six days photocopying thousands of his documents.

After Respondent's surprise inspection was complete, Petitioner filed an Order to Show Cause to vacate Respondent's *ex parte* orders and to have the thousands of documents taken by Respondent from Petitioner's office, home and car returned to him. (CT: Vol. 1: 76-171) As a result of this application, the court vacated the *ex parte* orders, ordered the records seized by Respondent sealed, and appointed a discovery referee "for all matters". (CT: Vol. 1: 206 – Vol. 2: 210) The court ordered Respondent propound requests for production and that Petitioner and the discovery referee cull through the records and produce only those documents responsive to Respondent's requests for production. (CT: Vol. 2: 208)

A discovery referee was appointed to preside over the examination of the 15 boxes of sealed records taken by Respondent. (CT: Vol. 2: 246) The discovery referee took three days to review the documents with Petitioner's employee, Maureen Sowell, who the referee specified "was very knowledgeable about the documents". (CT: Vol. 2: 246)

The discovery referee separated the documents removed from Petitioner's office by Respondent into four different categories. The first category involved documents bates stamped between 1 and 199,999 which were responsive to the document requests propounded by Respondent. Respondent received copies of these documents. (CT: Vol. 2:247)

The second category involved documents bates stamped between 200,000 and 299,999 which were personal and confidential, including attorney-client

communications and employee income tax K-1 forms. The referee determined Respondent had no right to these documents. (CT: Vol. 2: 247)

The third category involved documents bates stamped above 300,000 and included documents relevant to Respondent's written demand but were in need of redaction or weighing of privacy interests. (CT: Vol. 2: 247)

Petitioner filed his first request for trial setting on March 30, 1995. (CT: Vol. 2: 251)

The original trial date in this matter was set for July 23, 1996. (CT: Vol. 3: 420) That trial date was vacated by the Court and re-set as a 26 day trial for October 28, 1996. (CT: Vol. 6: 1099) Respondent made a motion to vacate that trial date based on the contention she needed more time and money to prepare adequately for trial. (CT: Vol. 6: 1102-1117)

Petitioner filed an opposition to Respondent's motion to vacate the trial date based in part on the fact extraordinary and extensive discovery had already been conducted. (CT: Vol. 7: 1260-1401) Chief among Petitioner's points made to the court was that he already responded to two 50+ page document demands from Respondent (attached as exhibits to his opposition), already had his deposition taken, and already had his office, home and car raided with the result of 15 boxes of documents taken away by Respondent. In short, Petitioner wanted trial to proceed so he could get on with his life and not be subject to the rigors of Respondent's continuing, extensive and expensive discovery. (*Id.*)

Respondent vehemently objected and argued she needed more time to conduct discovery. (CT: Vol. 7: 1402-1420) Respondent's arguments prevailed and the court vacated the October 28, 1996 trial date and extended the discovery cut-off date to 30 days before the next date set for trial. (CT: Vol. 7: 1421-1423)

On October 16, 1996 the judge presiding over the Michaely's divorce entered a Statement Of Decision and Statement of Facts relating to his order suspending the "one deposition rule" under the terms of *Code of Civil Procedure* §2025(t) and Respondent's need to "depose Respondent regarding the movement of monies, to update information on other issues and to complete her investigation in order to properly prepare for trial." (CT: Vol. 10:1905-1906)

On October 16, 1996 Respondent filed a motion to compel further responses to her second demand for production of documents propounded to Petitioner. (CT: Vol. 8: 1519 – Vol. 10: 1904) Said motion was denied by the court.

Respondent also brought a motion to compel further answers to special interrogatories propounded to Petitioner, which was then referred to the discovery referee. (CT: Vol. 13: 2495-2498) The referee determined (and the court adopted as its order) that Petitioner need not provide further answers to many of the 300 special interrogatories, including numbers 1, 2, 3, 5, 6, 13, 14, 15, 16 ,17, 18, 21, 22, 23, 25, 26, 27, 28, 29, 30, 31, 32 and 34. (CT: Vol. 16: 3134-3143) Of interrogatories 36 through 300, Petitioner was ordered to provide further responses to 35-50, 52-63, 68, 69, 71, 73-85, 87-167, 170-270 and 274

through 300. (CT Vol. 16: 3134-3143) Petitioner provided Respondent with these further, very detailed responses in compliance with the orders of the court. (CT Vol. 18: 3640-3679)

Trial was set once again, this time for August 6, 1998. (CT Vol. 16: 3131) This meant Respondent had until July 7, 1998 to finish her discovery per the terms of the court's prior order extending the cut-off date. (CT Vol. 7: 1421-1423),

Once again Respondent filed a motion to vacate the trial date based upon her proven argument that she needed more time. (CT Vol. 19: 3688 – Vol. 19: 3708) Petitioner opposed Respondent's request, stating in part Respondent had adequate time for discovery, had in fact conducted extensive discovery, and that Respondent was the root cause of the fact trial would not be going forward because she filed for bankruptcy and there was an automatic stay in effect. (CT Vol. 19: 3730-3779)

All sides agreed economic issues could not proceed in the state court divorce action until a relief from the automatic stay in Respondent's bankruptcy case was obtained. The gist of the contest between Respondent and Petitioner for the purposes of Respondent's second motion to vacate the trial date revolved around yet another extension of the discovery cut-off date. After three and half years of discovery, Respondent wanted more. (CT Vol. 18: 3688-3699) Petitioner argued discovery should be finished. (CT Vol. 19: 3740-3743)

At the hearing on Respondent's motion, counsel for Respondent argued Respondent's bankruptcy made

them lose "ten months in connection with the discovery." (RT [6/17/'98] C-5:24-25)[2]

The trial court agreed with Petitioner and refused to extend the discovery cu -off date or to vacate the trial date. (CT Vol. 19: 3799-3801) The court simply did not accept Respondent's argument: "I can only repeat, the fact that your client might go into the bankruptcy should have been obvious way back." (RT [6/17/'98] C-5:26-28) "Counsel, I asked you. I said, 'Figure it's going to be done the hard way.' You picked a date a year away. I never set trials that far off. I did it because of your statement." (RT [6/17/'98] C-6:2-5) "As far as discovery, I think I've stretched it out long enough. I don't want to extend it pass the current date."

As placed in evidence in Petitioner's divorce, the trustee in Respondent's bankruptcy determined after "diligent inquiry" the Michaely's marital estate (the entirety of which was at issue by way of Respondent's bankruptcy) was a "No Asset Case". (CT Vol. 25: 4966)

Respondent never took Petitioner's deposition between the October 16, 1996 suspension of the "one deposition rule" and discovery being halted altogether on July 7, 1998 (more than 20 months).

Respondent did, however, take the deposition of Maureen Sowell ("Sowell"). From the outset of this case Respondent acknowledged Sowell's importance. In her own declaration in support of her *ex parte* orders

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2. "RT" refers to the Reporter's Transcript of court proceedings on file and part of the record of appeal in this case.

obtained on the day she filed for divorce Respondent wrote: "Maureen Sowell has access to financial information, bank records and other business records located at my husband's office. Ms. Sowell is also authorized to sign on various bank accounts held in the names of these entities." (CT Vol. 1: 59-60) In fact, even a cursory review of the orders issued by the judge that day shows Sowell's name appears dozens of times. (CT Vol. 1: 14-32) Respondent believed Sowell was a crucial witness in making her case.

On July 9, 1998 Respondent brought an *ex parte* motion to compel Sowell's deposition. (RT: Vol. 19: 3803-3892) Respondent asserted Sowell was a "critical and essential witness" intimately involved with Petitioner's day to day business as a notary public, corporate secretary, corporate officer and limited and general partner of many of Petitioner's business entities. (CT: Vol. 19: 3803 – 3892)

In opposition to this *ex parte* request, Petitioner pointed out to the court the discovery cut-off date it recently refused to extend had, in fact, come and gone. (RT Vol. 19: 3893-3896) The court shortened time for hearing and ultimately ruled Sowell had to give her deposition despite the fact the extended discovery cut-off date was passed.

Sowell testified about bank accounts, properties, business entities, foreclosures, business practices and every other thing Respondent wanted to know about. Sowell testified about Petitioner's dates of acquisitions, dates of sales, transfers of assets, partners and partnerships, corporations and corporate officers, assets and all manner of Petitioner's business activities. (CT Vol. 32: 6547 – Vol. 37:7585)

The Michaely divorce was then transferred to another department. As a result, Respondent decided to bring another motion to reopen discovery for the purpose of taking Petitioner's deposition. (CT Vol. 24: 4780-4891) Respondent based this motion in part on the allegation "she has not had the opportunity to depose Respondent in any detail regarding their assets, Petitioner's claims regarding misappropriation and reimbursement issues, and support." (CT Vol. 24: 4792: lns. 23-26)

Petitioner opposed Respondent's efforts to reopen discovery to depose him again. (CT Vol. 24: 4912 – 25: 5015) He pointed out to the new judge that the prior judge already refused to extend discovery after having already extended it for more than a year. He argued the trial in this matter should have already taken place (and that the prior judge said it should have already taken place) but for the fact Respondent filed personal bankruptcy. He argued Respondent had all of his documents from the day the case was filed and had taken Sowell's deposition which provided Respondent with a wealth of detailed information. (*Id.*)

Most importantly, though, Petitioner argued Respondent had sat on her rights to further depose Petitioner after the suspension of the "one deposition rule" and after the trial judge extended discovery past the original cut-off date. (CT: Vol. 24: 4922-4926) Respondent "had the opportunity" but did not take Petitioner's deposition between June 1996 and extended discovery cut-off date of July 1998.

Petitioner's opposition also detailed how Respondent's attorneys, as third party creditors in Respondent's bankruptcy action (i.e. they were owed

millions of dollars of fees for their work for Respondent over the past years representing her in her divorce against Petitioner) themselves conducted discovery into the very issues they were now asking the court to decide. For example, Respondent's motion to re-open asked to permit her to take the deposition of a third party while her own attorneys had already been granted such an order to depose that same third party as part of Respondent's own personal bankruptcy. (Vol. 25: 4964)

Respondent once again prevailed and the court ordered Petitioner's second deposition taken despite the fact the discovery cut-off date had come and gone not once, but twice over the period of three and a half years. (CT Vol. 25: 5059; CT Vol. 26: 5290-5294) The judge also ordered various judicial officers to act as referees during Petitioner's second deposition. (CT Vol. 25: 5061-5062; CT Vol. 26: 5290-5294)

Petitioner, per the court's order and at Respondent's expense, flew from his home in Israel and returned to Los Angeles for his second deposition. During the course of that deposition he answered "I don't recall" or "I don't remember" to about one half of the questions posed. He substantively answered the rest of those posed over the several days of his continuous testimony.

As a result of Petitioner's performance at his second deposition, on September 1, 1999 Respondent brought a motion for discovery sanctions establishing, *inter alia*, that the estate had a value in excess of $21,000,000, that Petitioner breached his fiduciary duty to Respondent regarding dozens of real estate assets, and that Petitioner could pay and Respondent needed to be

paid at least $19,000 per month for spousal support. (CT Vol. 26: 5306 – Vol. 28: 5572) Petitioner opposed these requests. (CT Vol. 29: 5845-5975)

The matter was referred by the trial judge (having replaced the trial judge who made the order to permit Petitioner's second deposition) to yet another discovery referee, who also happened to be a judge who had previously presided on various issues in this case but had since retired. This referee was present at Petitioner's second deposition.

As this referee's report indicates, the matter was heard by her on February 15, 2000. (CT Vol. 31: 6295) Her report, however, was not signed by her until October 2, 2000 (CT Vol. 31: 6337) and not filed with the court until November 9, 2000 (CT Vol. 31: 6295)

Some 19 months later, on June 20, 2002, the trial judge signed the order adopting all of the discovery referees recommendations (literally hundreds of pages) without a single change. (Vol. 50: 9808)

Three years later, that same judge entered the Final Judgment on Reserved issues on August 17, 2005, incorporating all of the discovery sanctions. (CT: Vol. 50: 10272-10278)

During the course of the underlying litigation, the court ordered Respondent have exclusive occupancy of the community residence. (CT Vol. 2: 258 lns. 20-22)

Having been notified by Petitioner of the proposed sale of community property, Respondent obtained orders

from the court enjoining that sale and permitting her own real estate appraiser to have access to the property. (RT Vol. 2: 276) In her moving papers, Respondent demonstrated an intimate understanding of the partnership, including who its partners were, what its partnership agreement stated and what its value was. (RT Vol. 2: 289 lns. 8-25) As an alternative to the sale, Respondent sought the appointment of a receiver. (RT Vol. 2: 293)

On March 12, 1996 Petitioner and Respondent entered into a Stipulation relating to the sale and inspection of 12 community real estate assets which, in part, gave Respondent's real estate appraiser access to each property. (CT: Vol. 3: 423-424)

On September 4, 1996 Respondent was given exclusive management and control of the net proceeds from the sale of another community asset known as "Miranda" in the amount of $28,000. (RT: Vol. 7:1425-1472)

On March 29, 1996 Petitioner filed a motion to modify his spousal support. Among the evidence contained therein was an accounting showing Petitioner paid Respondent the sum total of $224,037.11 of support since the inception of their divorce in January 1995. (CT Vol. 3: 451-452; Vol. 4: 791) Petitioner's request to modify was denied by the court. (CT Vol. 6: 1100-1101)

On November 26, 1996 Respondent was granted a charging order against Petitioner's 80% community property interest in a partnership to satisfy unpaid spousal support. (CT Vol. 12: 2394-2399) That order

further gave Respondent "immediate management and control" of other community property, including her to receive the net rental income derived from that property. (CT Vol. 12: 2395 lns. 18-24) That order also stated Respondent was to receive all of the net proceeds from the sale of that property and that the second trust deed of that property was not to be paid. (CT Vol. 12: 2397 lns. 8-23)

On September 25, 1997 Respondent's motion to appoint a receiver over other community real property was entered by the court. (CT Vol. 20: 3919-3929)

On September 28, 1999 Petitioner's renewed motion to modify support was heard. The court determined and found Petitioner had a gross income of $5,000 per month and that Respondent had no income at all. (CT Vol. 31: 6218 lns. 8-10) As a result, the court reduced Petitioner's spousal support obligation from $7,500 per month to $1,700 per month. (*Id.* at lns. 11-16)

B. The Court of Appeal's Decision

The Court of Appeal's decision in this case, certified for publication, does not contextualize why or how the draconian sanctions imposed were warranted. In short, the Court of Appeal makes no effort to explain how the sanctions imposed redress the alleged dereliction of duty by Petitioner to respond to discovery in light of and considering the extensive and complex history of all discovery in this case.

The result of the sanctions in this case was that Respondent was prevented from presenting any

evidence of any kind or nature at the trial of this matter. He was not permitted to testify himself. He was not permitted to present expert witnesses. He was not permitted to present third party witness. He was not permitted to present documentary evidence.

The Court of Appeal simply determined there was "no abuse of discretion" when the trial court ordered Petitioner could present no evidence at trial contradicting the issue sanction that he had the ability to pay more than $19,000 per month for spousal support, that the community estate had a value of $21,000,000, or that Petitioner defrauded Respondent.

In doing so, the Court of Appeal ignored the fact Respondent obtained copious amounts of discovery over more than three years and numerous vacated trial dates. The Court of Appeal ignored the fact Respondent sought and was granted a motion to take Petitioner's second deposition and then failed to do so for 20 months before the trial court finally refused to grant her third request to continue the discovery cut off date (i.e. that Respondent was not vigilant and sat on her rights). The Court of Appeal ignored the fact Respondent had discovery extended in her case for more than 16 months.

Most importantly, the Court of Appeal ignored the reality of the facts of this case. While the sanctions imposed specified Petitioner had actually absconded with various community assets, the facts (as detailed herein above) reveal the record is replete with example after example showing those same assets actually were managed and sold by the Respondent and or receivers appointed at her request.

The sanctions imposed in this case are so severe they could only be reasonably imposed if Respondent had been unable to obtain any discovery of any kind as a direct result of Petitioner's failure to abide by discovery requests and orders. The Court of Appeal makes no effort to explain how the actual sanctions imposed are warranted by Petitioner answering "I don't recall" to about one half of the questions posed to him at his second deposition in a case where discovery had already been conducted for almost four years, where the discovery cut-off date had been extended numerous times, and where no court order regarding discovery had ever been violated.

In light of existing law, the Court of Appeal's unwillingness to say anything other than the sanctions were not an abuse of discretion creates a monumental exception to a well established rule that sanctions should be tailored to redress the alleged abuse. Using the rationale of *Michaely*, though, any judge or lawyer could simply argue the sanctions requested are not an abuse of discretion without ever reaching the analysis of how the sanctions requested are warranted considering the specific circumstances of each case. As such, the holding of this case flies in the face of the due process clause of the Constitution.

Michaely is in direct conflict with decisions annunciating a very different analysis and necessitating a very different outcome.

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEAL'S DECISION IN THIS CASE GIVES TRIAL JUDGES PLENARY POWER TO STRIP A LITIGANT OF THE RIGHT TO TRIAL WITHOUT REGARD TO DUE PROCESS

This case presents and important and recurring question: what is the due process standard relating to the imposition of discovery sanctions at the trial court level? The court below annunciated a broad and amorphous "arbitrary, capricious and whimsical" standard when other cases, most recently including a case from the same Second Appellate District of the California Court of Appeal, require a much stricter analysis.

"Discovery sanctions must be tailored in order to remedy the offending party's discovery abuse, should not give the aggrieved party more than what it is entitled to, and should not be used to punish the offending party." (*Karlsson v. Ford Motor Company* (2006) 140 Cal.App.4th 1202, 1214, 45 Cal.Rptr.3d 265)

Karlsson was a Second Appellate District case and constituted another in a long line of cases standing for the same thing. (*See also see also* (*Vallbona v. Springer* (1996) 43 Cal.App4th 1525, 1544-1549, 51 Cal.Rptr.2d 311, *Do It Urself Moving & Storage, Inc. v. Brown, Leifer, Slatkin & Berns* (1992) 7 Cal.App.4th 27, 35, 9 Cal.Rptr.2d 396, *Maldonado v. Superior Court* (2002) 94 Cal.App.4th 1390, 1399, 115 Cal.Rptr.2d 137)

"Sanctions should be appropriate to the dereliction, and should not exceed that which is required to protect the interests of the party entitled to the denied discovery." (*Deyo v. Kolbourne* (1978) 84 Cal.App.3d 771, 793)

In *Karlsson*, defendant Ford Motor Company was found to have been in wanton and intentional violation of numerous discovery orders.

In *Michaely* there is no dispute: Petitioner did not violate any discovery order, not even one. The only thing alleged is that the discovery referee did not believe him when he answered "I don't know" to about one half of the questions posed at his second deposition.

In *Karlsson*, the court determined defendant Ford Motor Company was the sole repository of the information sought.

Here, the record itself supports the undisputed fact Petitioner was not the only source of the information sought. The deposition of Maureen Sowell, for example, was lodged with the trial court by Petitioner in opposition to the trial court adopting the requested sanctions and are part of the record on appeal.

The questions asked of Ms. Sowell and Petitioner were identical on a question by question basis. Further, Ms. Sowell answered their questions so that by the time Petitioner was asked them at his second deposition Respondent already had answers. When Petitioner sat for his second deposition Respondent already had been told by Ms. Sowell when the properties were bought,

when they were lost, how much they cost and who the investors were, for example.

Unlike the Court of Appeal in this case, the Court of Appeal in *Karlsson* looked at the entirety of discovery in that case. Instead of effectively entering a verdict for the Plaintiff and depriving Defendant of the opportunity to present evidence at trial, the *Karlsson* Court tailored sanctions specifically to redress the information the Plaintiff could not have gotten from anyone but Ford and which Ford refused to produce.

Ford was not barred from presenting evidence at trial about all issues, as in this case. The reason: because the court in Ford looked at the specific alleged abuse and tailored the sanction to redress it. The Court in this case failed to do this or even acknowledge that doing so was a legal requirement. The court in this case also failed to make any ruling or undertake any analysis regarding whether or not Petitioner was the sole source of the information they sought. Sowell's deposition clearly showed he was not.

The Court of Appeal in this case failed to consider the long and tortured history of discovery in this case. They failed to recognize that unlike Ford, Petitioner had never once refused to obey a court order relating to discovery. The court violated Petitioner's right to due process in so doing.

The Court of Appeal also refused to address or consider the very important fact Respondent sought and was granted the right to take Petitioner's second deposition and then failed to do so. The Court of Appeal

refused to address or consider the fact the trial court extended discovery for Respondent numerous times and then, finally, cut it off.

Respondent was given the opportunity to conduct substantial discovery in this case. She was given the means to do so through the vast sums of cash paid to her by Petitioner during this case. In light of these facts the sanctions imposed are nothing less than an illegal punishment against Petitioner and, as such, violate his due process rights.

Given the extensive discovery effectuated by Respondent in this case (having started with a raid on Petitioner's offices on the day she filed), and given the voluminous and "doomsday" nature of the sanctions imposed, it is an egregious miscarriage of justice to simply state the sanctions were not an abuse of discretion.

How do these sanctions imposed fit in with the history of discovery in this case? *Karlsson* and *Vallbona* and *Do It Urself Moving & Storage* and *Maldonado* and *Deyo* require this question be answered. By failing to even ask this question, the Court in this case effectively repudiates *Karlsson* and *Vallbona* and *Do It Urself Moving & Storage* and *Maldonado* and *Deyo* and sets up a separate standard relating to the imposition of discovery sanctions in direct opposition to the holdings of these long established cases. Taking away a litigant's rights to present evidence at trial must be considered the last and most extreme sanction any court can impose for discovery sanctions. The wanton and carefree approach to doing so evident in this case seems to say

due process plays no role. The history of discovery in this case was not considered. The diligence of the Respondent was not measured. The reality of the disposition of the numerous properties (i.e. that they were controlled and sold by Respondent, often pursuant to court order) was not accounted for prior to imposing the very fanciful fiction of these sanctions.

Answering "I don't remember" to some questions at a second deposition, especially in light of previous and extensive discovery, should not be grounds for a judge's imposition of sanctions in effect gagging the mouth and binding the hands of a litigant at trial. The right to be heard is fundamental to the very concept of due process.

The ruling in this case gives license to every judge down the line to do the same without considering the context of the discovery abuse, without considering the sources of alternative information, without considering the diligence of the moving party, without considering the factual realities of the case. And without considering these things before a judge takes away a litigant's right to be heard at trial is to fail to consider due process itself.

It takes very little imagination to envision future litigants asking for issue and evidentiary sanctions based on the allegation that the opposition was simply incredible at their deposition like the offending party in *Michaely*. And that is exactly what this case will represent to future litigants should it go unchecked by this Court. After all, there is nothing in the record of this case showing Petitioner actually lied when he answered "I don't recall" to about half of the questions posed to him at his second deposition.

The sanctions imposed in this case are so all-encompassing and severe as to make one believe Respondent was not provided with any discovery of any kind or nature. Yet the only thing these sanctions are based upon is the fact Petitioner answered "I don't recall" to about half of the questions posed to him at his second deposition after years and years of successful discovery undertaken by Respondent.

The sanctions are so absurd and so out of whack with reality that they actually state that numerous properties controlled and sold by Respondent were "in fact" magically managed and controlled by Petitioner. The sanctions state Petitioner breached his fiduciary duty relating to these properties and that he absconded with them when Respondent, was in fact, paid the proceeds from their sale.

Respondent was the one ordered by the court to have control and sole use of the community residence (CT Vol. 2: 258 lns. 20-22), the Van Nuys Star Partners office building (CT Vol. 2: 276), the Cornell property (CT Vol. 24: 4804) and Miranda house (CT: Vol. 12: 2397 lns. 8-23). Respondent actually received hundreds of thousands of dollars from her control of these properties yet the sanctions state Petitioner actually stole them.

Such incongruous and ridiculous sanctions (i.e. when the sanctions create a fiction contradicted by the facts of the case) are the kinds of results this Court can expect if trial courts and the Court of Appeal are not required to abide by the standards announced by *Karlsson* and *Vallbona* and *Do It Urself Moving & Storage* and

Maldonado and *Deyo*. In short, courts will be able to simply make up anything they want without rhyme or reason and in abject contravention of actual facts, as in this case.

The fact these sanctions were imposed as a result of the court simply not believing Petitioner's testimony is doubly offensive to all concepts of due process. Most every lawsuit includes two sides where parties give diametrically opposed testimony relating to the same issue. As such, this case stands for the simple proposition that any judge could take away a litigant's right to present evidence and testimony at trial so long as that judge basis such sanctions on a finding he does not believe a litigant's testimony given at his deposition. Again, such a result is an insult to due process and must be reversed.

These kinds of results could never have happened if the trial court or the Court of Appeal actually bothered to look at the discovery and the facts in this case, as prior published opinions cited herein require.

Petitioner completed all discovery asked of him and abided by each and every discovery order prior to discovery finally being cut-off. Respondent had more than three and half years between January 1995 and July 1998 to conduct discovery, and she did so. The order to reopen discovery was only for the limited purpose of permitting Respondent the opportunity to examine Petitioner regarding issues relating to the time *after* July of 1998 when discovery was finally cut-off.

However, the sanctions imposed go back in time to 1995 covering a period when Petitioner sat for his first

deposition, Respondent raided his offices and Petitioner answered copious amount of written discovery. During that time Respondent also sought discovery from third parties, e.g. Maureen Sowell.

But the Court of Appeal never explains why the sanctions imposed in this case should go back to 1995. What did Petitioner do to deserve those sanctions? At most (if one accepts the contention that answering "I don't recall" can be the basis for such severe sanctions) Petitioner should have been refused permission to offer his personal testimony relating to anything after July 1998, when discovery was finally cut-off .

In light of the tremendous amount of discovery in this case by Respondent, sanctions going back to 1995 are incomprehensible and totally unsupported by even the most exaggerated read of what due process might mean in this context. The problem with the Court of Appeal's decision in this case is that they do not take into account any discovery facts. There is no analysis how *these* sanctions in light of the history of discovery in *this* case were justified to redress *this* alleged abuse.

When you sanction one party by stating they owe the other $21,000,000 for breaching their fiduciary duty, that they have the ability to pay $19,000 per month for support (which had previously been reduced to $1,700 per month after a contested hearing based on actual evidence and not out of this world sanctions), and that they cannot present any contrary evidence at trial, the least the Court should have done was explain how these sanctions were tailored to redress Petitioner answering "I don't recall" at his second deposition after all of the

discovery and right to discovery in this case. Anything less is simply unfair and contrary to every known concept of due process.

These sanctions are a punishment. These sanctions are not tailored to redress Petitioner's performance at his second deposition. These sanctions would only be warranted if Respondent had suffered a total deprivation of all discovery of every kind and could not have located the information from any other source but Petitioner. Instead, she had total access to all of Petitioner's business records from the very day the case was filed. The opinion upholding the propriety of these sanctions simply disregards all due process considerations as articulated by numerous, prior cases.

The Court of Appeal's "abuse of discretion" analysis in this case sounds good and is an easy out. However, it resulted in a complete miscarriage of justice.

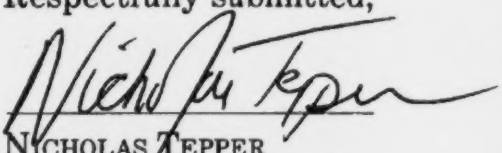
As importantly, though, is the fact that *Michaely* is grounds for every judge and every litigant to seek wildly outlandish and undeserved discovery sanctions. *Michaely* stands for the proposition that the history of discovery in a case need not be considered. *Michaely* stands for the proposition that sanctions can be imposed as a punishment and need not be tailored to redress the wrong.

Michaely stands in direct opposition to *Karlsson* and *Vallbona* and *Do It Urself Moving & Storage* and *Maldonado* and *Deyo* and, as such, should be reversed.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted,

Respectfully submitted,



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